Supreme Court, U.S.
FILED
OCT 30 2000
OFFICE OF THE CLERK

(2)

No. 00-398

IN THE

Supreme Court of the United States

COUNTY OF TEHAMA; ROBERT A. HEARD; JERRY FLOYD,

Petitioners,

v.

SHEROL DIRUZZA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Petitioners' arguments for review in this case are disingenuous and fallacious. If this writ is granted the Court must then review and overturn *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968) and the cases that have followed those decisions.

Petitioners seek review of three separate holdings of the Ninth Circuit: (1) that a deputy sheriff in Tehama County is not necessarily subject to termination for having actively campaigned in favor of the elected sheriff's opponent in a contested election; (2) that defendants Robert A. Heard and Jerry Floyd are not entitled to qualified immunity; and (3) that respondent DiRuzza's retaliation claim could proceed forward on nothing more than a question of fact as to the "influence" Heard and Floyd may have had on the decision to offer the plea bargain and as to their motivation for exercising such influence. This Court must deny certiorari as to all three of these holdings for the following reasons.

The question of whether or not an elected sheriff may dismiss those deputies who actively campaign against him has been addressed by several circuits. Petitioners contend that there exists a split among the different circuits and as such the subject must be addressed and clarified by this Court. The legal standard regarding this question has been addressed and established by this Court beginning with the decision in *Elrod v. Burns*, 427 U.S. 347 (1976) and has been reaffirmed and clarified in *Branti v. Finkel*, 445 U.S. 507 (1980). The decision by the Ninth Circuit follows that well established standard as does every circuit decision visiting this issue.

There is no split amongst the circuits as petitioners argue. There is but one legal standard being applied, but the actual results differ according to the facts of each individual case as well as the applicable state law within the jurisdictions. The lower appellate courts, in accordance with this Court's decisions, must look first at the state law which defines the position and responsibilities of the individual plaintiff/employee such as Ms. DiRuzza and apply the standard to the individual state law. As such, different appellate courts have reached and rendered different opinions regarding whether a particular deputy sheriff is protected from termination for failing to support a particular political candidate based on the specific facts of that case. The state law of California defines the responsibilities and authority of a deputy sheriff differently than that of North Carolina or Alabama. As such those circuit court decisions, while applying the same legal standard, have differed in result as a matter of different facts and state law, not interpretation of law.

Regardless of individual outcome, each circuit has applied the same standard decided in the *Elrod-Branti* line of cases and each has balanced the rights of the employee against the role of the government as an employer. *See Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968).

In order for the courts in the different circuits to render uniform decisions on questions presented by the petition, state laws would have to be changed and this court, of necessity, have to reverse its own long standing decisional law.

With respect to the issue of qualified immunity, the Ninth Circuit stated that while the specific situation has not been addressed in a previous action involving this respondent, the

issue has been addressed within the circuit. The legality of terminating a sheriff's deputy has been addressed in *Elrod* by this Court and subsequently by the Ninth Circuit in *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989). As such, within the Ninth Circuit, this issue has been clearly established; the burden is then on the defendants to show that their conduct was reasonable and that they had a reasonable belief in light of that law that their conduct was lawful.

There is nothing in the facts, or the decision of the Ninth Circuit that does away with the qualified immunity defense. The courts decision follows prior decisions and, as such, it is not necessary for this Court to review this issue.

Also, petitioners claim that this decision created a new constitutional tort based on the influence of a county sheriff to bring about a criminal prosecution. This argument is nothing more than a "strawman", the claim brought by respondent was for retaliation by defendants after the exercise of her First Amendment rights of free speech. Such an action has long been upheld and established as a civil right for which those denied such rights have legal recourse. This is a question of fact based on the evidence to be presented. As such this issue does not warrant certiorari review.

I.

THERE IS NO "SPLIT" IN THE CIRCUITS WHICH WARRANT SUPREME COURT REVIEW.

Petitioners argue that there is a split among the circuits as to which standard is to be applied when determining whether a deputy sheriff can be discharged, or reassigned

for the active political opposition of the elected sheriff. Petitioners' position is that a deputy is always a policymaker. Not even those cases on which petitioners rely contain such holdings. Indeed there is no split among the circuits on the issue. As discussed at length below, each circuit that has addressed this issue has relied upon and followed the analysis, long established by past decisions of this court, of *Elrod-Branti* and *Pickering* and the cases that have followed. This analysis was used by the Ninth Circuit in the instant case. It has been used by those circuits which have found sheriff's deputies to be subject to patronage dismissal as in the Fourth, Seventh and Eleventh Circuits as well as those circuits which have found that deputies are not subject to patronage dismissal as in the Third, Sixth and Tenth Circuits. The differences in these decisions are found in the state law which defines the office of sheriff's deputy and the actual duties performed in that position.

The key inquiry for each circuit has been, whether the individual deputy held a policymaking position. This then becomes a factual issue to be determined by the definition and description of the position as outlined by the facts and applicable state law. In those circuits where the courts of appeal have held that deputy sheriffs were policymakers subject to partisan dismissal, the holdings were not based simply on the job title of "deputy sheriff," but more importantly on an analysis of the actual job performed under that title in the states at issue.

A. The Ninth Circuit Decision In *DiRuzza v. Tehama County* Can Be Reconciled With Every Circuits' Ruling On Deputy Sheriff Patronage Terminations

The ruling of the Ninth Circuit is clearly consistent with decisions addressing the same or similar issues in the Third, Sixth and Tenth Circuits as well as those decisions of the Fourth, Seventh and Eleventh Circuits. Each circuit court, like the Ninth Circuit, applied the relevant state law to the facts and then applied the analysis of *Elrod-Branti* and the *Pickering* balancing test to determine if under the specific facts of the case, a deputy sheriff was or was not subject to patronage dismissal. While the outcome between the circuits may be different, the standard applied to reach those decisions were identical.

In each circuit the court's decision was not only based on the state law but on an analysis of the actual job performed under the title of deputy sheriff. Once the duties were determined the courts then applied the *Elrod-Branti* analysis and the *Pickering* balancing test.

The Ninth Circuit in *DiRuzza* followed this analysis. Under California law the title deputy sheriff refers to all peace officers employed by the county sheriff at whatever level or capacity. Cal. Government Code section 24101. As such the job title alone does not define the nature of the duties actually performed by the individual deputies and does not automatically make them policymakers. Following the analysis of *Elrod-Branti* the Ninth Circuit looked to the actual duties of Ms. DiRuzza to determine if she was indeed a policymaker. In evaluating this position the Ninth Circuit looked to a memorandum of understanding between the Tehama County Sheriff's Department and its employees.

This memorandum lists deputy sheriffs as the lowest ranking peace officers in the department, above secretaries but below sergeants, detectives and supervisory employees. In fact Ms. DiRuzza's actual duties were confined to the county jail. Looking to California law a deputy sheriff who works in a jail is responsible for the custody, care, supervision, security, movement, and transportation of inmates and is limited to her prescribed custodial duties. *California Penal Code section 830.1*. Reviewing these duties the Ninth Circuit found that Ms. DiRuzza was not a policymaker under *Elrod-Branti*.

The Ninth Circuit, like all other circuits, applied the *Elrod-Branti* analysis to the facts of the specific case before it. The decisions of the circuit courts are reconcilable, as they each apply the same standard to different facts.

1. The Decisions Of The Fourth, Seventh And Eleventh Circuits Are Consistent With The Decision Of The Ninth Circuit In *DiRuzza v. Tehama County*

In *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989) the Eleventh Circuit stated; "Under *Alabama* law, a deputy sheriff is the general agent of and empowered to enter into business transactions for the sheriff. Any transaction within the scope of the sheriff's duties may be acted upon by his deputy." (Emphasis added) (Citing *Ramsey v. Strobach*, 52 Ala. 513, 515 (1875).) Citing other pertinent *Alabama* state case law the court of the Eleventh Circuit stated that; "The deputy sheriff is the alter ego of the sheriff, *Mosely v. Kennedy*, 245 Ala. 448 (1944), and the sheriff is civilly liable for actions committed by a deputy sheriff in the performance of his duty. *Taylor v. Gibson*, 529 F.2d 709, 716 (5th Cir. 1976)." This is distinguishable from California law in that

while all peace officers employed in the county sheriff's office are sheriff's deputies, they do not all have the same responsibilities or authority. (*See People v. Otto*, 77 Cal. 45 (1888).)

Based on the previous decisions interpreting Alabama state law the Eleventh Circuit then applied the *Elrod-Branti* standard to the facts and balanced the rights of the individual and the government according to *Pickering* to make decision in accordance with the existing state law. In footnote three the court again relied upon Alabama state law citing the Alabama Code to support the discretionary and policymaking nature of sheriff's deputies. *See Terry, supra* at 380, n.3. This is distinguishable from the decision of the Ninth Circuit only on the basis of particular state law, not the application of the well established legal standards of *Elrod-Branti* and *Pickering*.

In *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), the Seventh Circuit utilized the standard established in *Elrod-Branti* and stated that standard required an

> examination of the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office . . . the test is whether the position held by the individual authorizes, either directly or indirectly, *meaningful input* into governmental decision making on issues where there is room for principled disagreement on goals or *their implementation*.

See Upton, supra at 1214. This application is not in conflict with the circuit court decision in this case. The Ninth Circuit looked to the specific job functions of respondent DiRuzza

when it stated, "The actual, not the possible, duties of an individual employee determine whether political loyalty is appropriate for the effective performance of her job." *See DiRuzza v. County of Tehama*, 206 F.3d 1304, 1310 (9th Cir. 2000).

When we look at the specific job functions of Ms. DiRuzza, as did the Ninth Circuit, we find that,

> Deputy sheriffs appear to be the lowest ranking peace officers in the department; in the Memorandum of Understanding, they are listed above secretaries and below other categories of employees such as sergeants and sheriff's detective investigators. DiRuzza asserts that she worked in positions associated with the jails during much of her time with the sheriff's department. A deputy sheriff in California who works in a custodial position in a jail is responsible for the custody, care, supervision, security, movement, and transportation of inmates, and is limited to her prescribed custodial duties. Cal. Penal Code section 830.1.

See DiRuzza, supra at 1311.

In *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), the court looked to the specific facts of the case and then to North Carolina law to find that the office of deputy sheriff is that of a policymaker and the alter ego of the sheriff. This decision was based on the *Elrod-Branti* and the *Pickering* balancing of the First Amendment rights of the deputy and the needs of the County as the employer. This decision, like the Ninth Circuit's decision in this case,

was made after a careful analysis of the facts and examination of the actual duties performed by the deputy sheriff and not just the title.

Thus, while different circuits have arrived at different results, the analysis and standards used have remained constant in all. Each case applied the standards of *Elrod-Branti* and *Pickering* to the specific facts of the case, looking to the applicable state law for a determination of the role of the deputy sheriff.

2. The Decisions Of The Third And Sixth Circuits Are Consistent With The Decision Of The Ninth Circuit In *DiRuzza v. Tehama County*

It is a matter of state and not federal law which determines the status of a deputy sheriff. In *Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir. 1991), we stated that "[t]o determine whether political considerations are appropriate in making personnel decisions for a certain position, we must examine the inherent duties of that position and the duties that the new holder of that position will perform." In this and other decisions the Sixth Circuit Court has followed the Ninth and other circuits in applying the standard of *Elrod-Branti* and looking at the actual duties of the individual, not at the job title alone.

The Sixth Circuit in *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997), looked to the specific facts of the case and found that a deputy sheriff was not subject to political based termination. This decision, based on the facts of the case follows *Elrod-Branti* in looking to the actual duties performed by the deputy sheriff and not just the title.

In *Burns v. County of Cambria*, 971 F.2d 1015 (3d Cir. 1992) the Third Circuit applied the *Elrod-Branti* standard to the specific facts of the case. Looking to the actual function and duties of deputy sheriffs in Cambria County the Third Circuit found that deputies in that county were not policymakers. This is not contrary to the findings in other circuits as each has looked to the actual duties performed by sheriff deputies in those jurisdictions and then applied the factors of *Elrod-Branti* to those facts.

While petitioners have correctly cited different outcomes among the circuit courts they have not demonstrated that those differences are based on the application of a standard other than those established by this court in *Elrod-Branti* and *Pickering*.

B. All Circuits Employ The Long Standing *Elrod-Branti* Standard In Determining Whether A Deputy Sheriff Is Subject To Patronage Dismissal.

As stated above, each circuit court which addressed the issue of patronage dismissals of deputy sheriffs have employed the *Elrod-Branti* analysis to the specific facts. Although the results have differed from circuit to circuit, this is not a result of differing interpretation of law but is a result of factual differences. The position of deputy sheriff is defined by state law, some states such as Alabama have made the sheriff deputy the alter ego of the sheriff, able to incur liability for the county and department by which he is employed as well as making decisions. In California all law enforcement personnel employed by the county sheriff carry the title of deputy sheriff but only those in specific positions are given authority to make policy or contract for their

department. As such, each of the circuits have applied the same analysis and legal standard of *Elrod-Branti* to different factual situations with different results.

As there is no split among the circuits certiorari review is not needed and the petition for certiorari must be denied.

II.

THE DECISION OF THE NINTH CIRCUIT WITH RESPECT TO QUALIFIED IMMUNITY IS CONSISTENT WITH THE RELEVANT DECISIONS OF THIS COURT AND DOES NOT WARRANT REVIEW BY WRIT OF CERTIORARI.

Petitioners argue that the Court must review the instant decision because the Ninth Circuit has diverted from well established law on the issue of "Qualified Immunity." Such is not the case.

Qualified immunity is available and afforded to government officials who are performing discretionary functions and shields them from civil liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In addressing the question of qualified immunity the Ninth Circuit relied upon the well established two part analysis of *Harlow*.

A. The Ninth Circuit Did Not Divert From Well Established Rules Of Law On Qualified Immunity

The long established rule for determining qualified immunity of a government official under *Harlow* requires a

two part analysis: "(1) whether the law governing the official's conduct was clearly established , and (2) whether, given this clearly established standard, a reasonable official could believe that his or her conduct was lawful." *See Biggs v. Best, Best & Krieger*, 189 F.3d 989 (9th Cir. 1999). In determining whether plaintiff had a clearly established right at the time of the action we must look at the legal landscape as it existed at that time. Once that is done then the court must look to the reasonableness of defendants actions in light of that legal landscape. *Figueroa v. U.S.*, 7 F.3d 1405, 1409 (9th Cir. 1993).

The Ninth Circuit admittedly had not ruled specifically on whether deputy sheriffs in Tehama County were policymakers prior to this case, nor had this Court. However, in 1976 the Supreme Court ruling in *Elrod* involved a sheriffs department and addressed the issue of retaliation for the exercise of First Amendment rights. The Ninth Circuit in 1989, five years prior to this case, and defendants actions, ruled that sheriff's deputies in the state of California were not per se policymakers. *See Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989). As such according to *Harlow* the law was clearly established in 1989 and in 1995. The Ninth Circuit did not establish a new standard for determining qualified immunity but followed these well established rulings.

B. The Issue Of Qualified Immunity Is Now One Of Fact And Therefore Not Ripe For Supreme Court Review

The Ninth Circuit has applied the long standing rule of *Harlow* in determining that the issues to be decided regarding qualified immunity are factual. As this petition is from the decision on a motion for summary judgment, this issue

should now be brought before the trial court to be judged by the evidence. Prior decisions of the Ninth Circuit are binding with respect to clearly established right. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), *see also Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987).

III.

DIRUZZA'S CLAIM FOR UNCONSTITUTIONAL RETALIATION IS BASED UPON THE EXERCISE OF HER FIRST AMENDMENT RIGHT OF FREE SPEECH NOT THE "STRAWMAN" ARGUMENT PETITIONERS PRESENT.

Petitioners also argue that the decision of the Ninth Circuit has created a new constitutional tort. That is not the case. It has been well established that retaliation for the exercise of one's First Amendment rights of expression is actionable. *See generally Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). Retaliation has been found in actions as "trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." *Rutan, supra* n.8. In the instant case the ninth circuit stated that; "there are disputed material facts regarding whether defendants took adverse job action against DiRuzza and whether political retaliation was a substantial or motivating factor." *DiRuzza, supra* at 1314. The issue of suggested prosecution and subsequent plea of DiRuzza is simply evidence in the case. The liability is based on well established 1983 law. Nothing in the decision establishes liability for the prosecution itself.

The facts of the instance case show that Ms. DiRuzza had previously been disciplined for the act of discharging

her weapon, the very act which petitioners defendants use to support their encouragement, in fact recommendation of her prosecution by the District Attorney. Thus, the Ninth Circuit concluded that a jury could conclude that the prosecution was suggested by petitioners as a form of retaliation. This does not create a new constitutional tort.

For the foregoing reasons there is no issue requiring, or suitable, for the review of this High Court.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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